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No. 97-1862

In The

Supreme Court of the United States

October Term, 1997

LIONEL DELA ROSA,

Petitioner,

vs.

SCOTTSDALE MEMORIAL HEALTH SYSTEMS, INC., et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

MARTHA E. GIBBS
Counsel of Record
JOSEPH E. LAMBERT
SNELL & WILMER L.L.P.
Attorneys for Respondents
One Arizona Center
Phoenix, Arizona 85004-0001
(602) 382-6233

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OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

Whether the district court correctly determined, on the evidence before it, that there was no genuine issue of material fact for trial and therefore appropriately granted Respondents summary judgment on Petitioner's claims.

LIST OF PARTIES

Petitioner Lionel Dela Rosa is an individual.

Respondent Scottsdale Memorial Health Systems, Inc. is an Arizona corporation and has no parent, subsidiary, or affiliate that has issued shares to the public. Respondents Michael Johnston, Denise Johnston, and Todd Lyon are individuals.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents Scottsdale Memorial Health Systems, Inc. ("SMH"), Michael Johnston, Denise Johnston, and Todd Lyon, respectfully request that this Court deny the Petition for Writ of Certiorari submitted by Petitioner Lionel Dela Rosa.

STATUTES INVOLVED

Petitioner's federal claims are based upon Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e, *et seq.* ("Title VII"), and the Age Discrimination in Employment Act, as amended, 29 U.S.C. § 621, *et seq.* ("ADEA").

The relevant portions of Title VII and the ADEA are as follows.

> It shall be an unlawful employment practice for an employer –
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;

42 U.S.C. § 2000e-2(a)(1).

> It shall be unlawful for an employer –
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation,

> terms, conditions, or privileges of employment, because of such individual's age;

29 U.S.C. § 623(a)(1).

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because [such individual] has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-3(a).

> It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment . . . because such individual . . . has opposed any practice made unlawful by this section, or because such individual . . . has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.

29 U.S.C. § 623(d).

STATEMENT OF THE CASE

Nature and Status of the Case

On July 29, 1994, Petitioner Lionel Dela Rosa ("Dela Rosa") filed a Complaint in the Superior Court of the State of Arizona for the County of Maricopa asserting nine separate counts against Respondents SMH, Michael and Jane Doe Johnston ("Johnston"), and Todd and Jane Doe Lyon ("Lyon").

On August 12, 1994, Dela Rosa filed an Amended Complaint ("Complaint") adding a tenth count to his lawsuit. The ten counts of the Amended Complaint were (I) Race Discrimination in alleged violation of Title VII,[1] (II) Age Discrimination in alleged violation of the ADEA, (III) Retaliation in alleged violation of Title VII and the ADEA, (IV) Breach of Contract, (V) Breach of Covenant of Good Faith and Fair Dealing, (VI) Personal Injury – Battery, (VII) Interference with Contract, (VIII) Negligent Supervision, (IX) Intentional Infliction of Emotional Distress, and (X) Wrongful (Constructive) Discharge.

Dela Rosa's lawsuit was served on Respondents in August of 1994. On August 22, 1994, Respondents removed the case to the United States District Court for the District of Arizona. The case was assigned to District Court Judge Roger G. Strand.

On December 8, 1995, Respondents filed their Motion for Summary Judgment on all ten of Dela Rosa's claims. After the motion had been fully briefed and argued, the District Court granted Respondents summary judgment on all counts. The District Court's Order and Judgment were issued and entered on September 20, 1996.

Dela Rosa filed a timely appeal to the United States Court of Appeals for the Ninth Circuit. The appeal was fully briefed and argued and, on December 2, 1997, the Ninth Circuit entered its order affirming the District

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[1] Although Dela Rosa previously told his coworkers that he was Spanish-Italian and/or Jewish, since he filed his grievance in April of 1993 he has claimed to be Mexican-American.

Court's grant of summary judgment. Dela Rosa thereafter filed his Petition for a Writ of Certiorari.

Summary of Relevant Facts

Dela Rosa was employed as a Biomedical Engineering Technician II with SMH from April 9, 1990, to August 10, 1994, when he quit, claiming that he had been discriminated against, retaliated against, and constructively discharged because of his national origin and age. The EEOC investigated and found no merit in any of his charges.

Dela Rosa was one of four Biomedical Engineering Technicians ("BMETs") who shared a workshop with three Communications Equipment Technicians at SMH's North hospital. Although as a journeyman BMET II Dela Rosa was expected to provide leadership and guidance to his coworkers, his record reflected a pattern of interpersonal problems with coworkers and other staff.

On May 26, 1993,[2] Dela Rosa became irate and confrontational over coworker Todd Lyon's attempts to assist him in repair of a dialysis machine. On May 27, Respondent Michael Johnston, the Biomedical Engineering Specialist in charge of the shop, gave Dela Rosa a written warning for his confrontational behavior during the argument with Lyon. On June 1, Dela Rosa filed a grievance objecting to the written warning and, *for the first time*, claimed he had been the subject of unlawful

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[2] Unless otherwise specified, all dates hereinafter are 1993.

discrimination.[3] As his grievance progressed through the steps of the SMH's internal process, Dela Rosa pointed to four alleged incidents of misconduct by other employees as evidence that he was being treated differently. None of those incidents involved a heated verbal confrontation like that for which Dela Rosa had been warned.

Hospital Administrator Thomas Sadvary ultimately withdrew the written warning, despite recognition of Dela Rosa's ongoing problems with coworkers and "end users" because, procedurally, Johnston had failed to hear Dela Rosa's side of the story before issuing the warning. In the meantime, Dela Rosa filed discrimination and retaliation charges with the EEOC. Dela Rosa later provided the agency a "Chronicle of Discrimination" listing the incidents of "harassment" on which his charges relied.[4] The EEOC investigated Dela Rosa's charges and issued findings of "No Cause" as to both.

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[3] Dela Rosa enumerated 31 points objecting to the written warning. None of those 31 points alleged or suggested racial or age-based discrimination, but Dela Rosa labeled the subject of his narrative "Racism and age discrimination" and closed with the statement: "As a minority, I have been subject to a lot of discrimination."

[4] The incidents of "discrimination" chronicled by Dela Rosa included the "disparaging racial joke, intentional physical injury in the form of a chemical burn, poisoning, workplace sabotage, and personal property damage" referenced in Petitioner's second Question Presented. The facts before the courts below established an absence of evidence that those incidents were motivated by animus against Dela Rosa's race, national origin, and/or age.

The single "disparaging racial joke" was the *only* event alleged by Dela Rosa which could be viewed as reflecting an unlawful animus. Both courts below correctly found that a single incident of an objectionable joke told by a nonparty coworker was insufficient to support an inference of unlawful animus. Appendix to Petition at B-9.

The "intentional physical injury in the form of a chemical burn" refers to an incident over two years before Dela Rosa quit his job. In horseplay, Lyon had sprayed Dela Rosa and two other coworkers on the back with Freon from an aerosol can. *Neither of the two other coworkers was Hispanic or over 40 years of age*; there was no hint of discriminatory animus; Lyon apologized for the incident; and a disciplinary memo was placed in Lyon's file.

The "poisoning," *although never mentioned to anyone in authority until seven months after the alleged incident*, refers to Dela Rosa's asserted belief that someone put something in his coffee because it tasted awful and caused him to gag. Neither a foreign substance nor a perpetrator has ever been identified. Appendix to Petition at B-7. In addition, there was no evidence that the incident, if it occurred, involved any of Respondents or was motivated by discriminatory animus.

The "workplace sabotage" apparently refers to Dela Rosa's belief that someone intentionally loosened the brackets on his workbench. Dela Rosa persists in asserting that sinister forces were at work even though Dianne Barazza-Mooney, a Mexican-American coworker, explained at the time of the incident that she had accidentally run into his workbench with a heavy piece of equipment, probably loosening the brackets. Appendix to Petition at B-8 to B-9. Again, there is no evidence that the brackets were otherwise loosened, much less that they were loosened intentionally by Respondents, or out of animus against Dela Rosa's race, national origin, and/or age.

The "personal property damage" apparently refers to Dela Rosa's unsupported belief that someone intentionally put a

Dela Rosa's performance problems, which began long before the May 26 confrontation,[5] continued unabated. Johnston continued receiving complaints from Dela Rosa's coworkers and the nursing staff and Dela Rosa was counseled twice more about his attitude and performance. Finally, Dela Rosa refused to meet with his supervisors about the complaints they continued to receive from nursing staff and quit, claiming unlawful discrimination.

All of Dela Rosa's claims arose from incidents alleged to have occurred over a period of two years at SMH's North Hospital. Both the District Court and the Ninth Circuit were presented with a complete record of all the evidence pertaining to those incidents. Both the District Court and the Ninth Circuit concluded that the evidence was insufficient for a reasonable jury to return a verdict for Dela Rosa on any of his claims.

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wooden golf tee under one of the tires of his vehicle and, on another occasion, deflated his tires while his vehicle was parked in a *public* parking lot at SMH's North Hospital. There never has been any evidence to implicate Respondents in such actions, much less evidence to suggest that any such actions were motivated by animus against Dela Rosa's race, national origin, and/or age.

[5] Before Dela Rosa's May 26 confrontation with Lyon, Johnston had received 6 complaints from Dela Rosa's coworkers and the nursing staff; a previous supervisor twice had evaluated Dela Rosa as deficient in his knowledge of the equipment he was employed to repair; and Dela Rosa had been counseled twice about performance deficiencies and attitude/communications problems with coworkers and nursing staff.

REASONS FOR DENYING THE PETITION FOR A WRIT

The Court should decline to accept jurisdiction of this case because it presents no novel or important issues and was decided by the courts below in accord with settled law. Contrary to what Dela Rosa baldly asserts, there is no conflict between the law applied by the Ninth Circuit and that applied by the other circuits and this Court. *See* Petition at 11.

I.

THE COURTS BELOW APPLIED THE APPROPRIATE STANDARDS OF EXAMINATION AND REVIEW.

A. The Ninth Circuit Correctly Reviewed The Case *De Novo*.

Although Dela Rosa understandably does not appreciate the outcome of the Ninth Circuit's analysis, that does not mean the Ninth Circuit applied the wrong standard of review or is otherwise in conflict with other circuits or with this Court. Indeed, the Ninth Circuit's Memorandum decision expressly applies the *de novo* standard of review, tracks the relevant law, and arrives at the same conclusion as the District Court. *See* Appendix to Petition at A-2 through A-11.

B. The Courts Below Viewed The Evidence In The Light Most Favorable To The Non-Moving Party.

Notwithstanding Dela Rosa's attempt to suggest otherwise, there is no issue of whether he "was entitled to have the District Court and the Ninth Circuit review the

evidence and inferences that may have been drawn from the evidence . . . in the light most favorable to Petitioner. . . . " *See* "Questions Presented" Number 1, Petition at iii. Of course he was, and that was precisely the rule followed by the District Court and the Ninth Circuit in examining Dela Rosa's claims. The District Court's Order expressly adopted the appropriate legal rule for analyzing a motion for summary judgment:

> In evaluating a summary judgment motion, the inquiry is whether, with respect to any dispositive issue, the pleading and support materials show there is no genuine issue of material fact, and if not, whether *viewing the evidence and inferences which may be drawn therefrom in a light most favorable to the non-moving party,* the moving party is entitled to judgment as a matter of law.

Appendix to Petition at B-2 (citations omitted) (emphasis added).

Dela Rosa's argument is essentially that the courts below *must* have applied the wrong standard because they came to the wrong conclusion, from his perspective. Unfortunately, Dela Rosa has never quite grasped the difference between drawing an inference based on circumstantial evidence and drawing an inference out of thin air. There simply never was evidence to support the inferences of discriminatory and retaliatory animus requisite to Dela Rosa's claims. The courts below ruled correctly, given the absence of evidence upon which a jury could legitimately have found for Dela Rosa. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

II.

THE COURTS BELOW ADHERED TO SETTLED PRINCIPLES OF LAW IN THEIR DISPOSITION OF THIS CASE.

A. The Courts Below Correctly Found An Absence Of Evidence To Link The Alleged Incidents Of Harassment To An Unlawful Discriminatory Motive.

"General harassment if not racial or sexual is not actionable." *See Bolden v. PRC Inc.*, 43 F.3d 545, 551 (10th Cir. 1994), *cert. denied*, 516 U.S. 826 (1995). Dela Rosa's hostile environment claim failed because he could not show that the alleged incidents had *any* nexus to his age or race. As observed by the Seventh Circuit:

> Federal law provides that an employee is to be free from racial discrimination in the workplace, which includes freedom from a racially hostile work environment. It does not guarantee a utopian work place, or even a pleasant one. If the workplace is unsavory for any reason other than hostility generated on the basis of race, gender, ethnicity, or religion, no federal claim is implicated.

Vore v. Indiana Bell Telephone Co., 32 F.3d 1161, 1164 (7th Cir. 1994).

Dela Rosa erroneously claimed that he was the only one in the work group experiencing incidents of "harassment" and presented *no* evidence to establish a nexus between the incidents and his race or age.[6]

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[6] Dela Rosa never alleged that *any* comments or representations were made concerning his age, and his conclusory

The District Court reviewed all the incidents Dela Rosa alleged as "harassment" and concluded that "Plaintiff's recitation of incidents fails to demonstrate any of the events was motivated by plaintiff's national origin or age. The most plaintiff can do is state that he *believes* the incidents were motivated by discrimination." Appendix to Petition at B-9 (emphasis added). The District Court implicitly found what should have been obvious to Dela Rosa or his counsel from the beginning – that Dela Rosa's asserted beliefs, even if sincerely held, are not *evidence* of discrimination. *Holt v. KMI-Continental, Inc.*, 95 F.3d 123, 130 (2d Cir. 1996), *cert. denied*, 117 S. Ct. 1819 (1997).

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assertions of race-based animus must be viewed in light of his tendency to characterize benign conduct as discriminatory or threatening. For example, Dela Rosa testified that his supervisor at a previous place of employment disliked him because he was Mexican and he could tell this by the way his supervisor sometimes crossed his arms and took a sideways stance when speaking with him.

Dela Rosa also was not the only person subjected to the practical jokes he chose to resurrect and recast as "harassment." Although SMH attempted to minimize it, employees in and around the BMET unit were known to glue coins and other objects to the linoleum floor and to each other's work benches, to spray each other with Freon cans, to inject water into each other's foam seat cushions, and to engage in similar practical jokes from time to time. The practical jokers subjected each other and sometimes other employees to such pranks without regard to race or age. The conduct may have been immature; perhaps even obnoxious. It did not, however, involve unlawful discrimination and there is absolutely no evidence that it did. Dela Rosa's "evidence" is his totally uncorroborated belief that the alleged incidents were somehow attributable to Respondents and that they were somehow motivated by his age or national origin.

"[P]urely conclusory allegations of alleged discrimination, with no concrete, relevant particulars, will not bar summary judgment." *Forsberg v. Pacific Northwest Bell Telephone Co.*, 840 F.2d 1409, 1419 (9th Cir. 1988). The Ninth Circuit was correct in agreeing and affirming. Appendix to Petition at A-4.

B. The Courts Below Correctly Found An Absence Of Evidence To Support Petitioner's Claim Of Disparate Treatment.

In order to establish a prima facie case of disparate treatment based on age or national origin, a plaintiff must show that:

(1) he is a member of a protected class,

(2) he was performing his job in a satisfactory manner,

(3) he suffered an adverse employment decision, and

(4) he was treated differently than similarly situated persons outside his protected class.

Hughes v. Brown, 20 F.3d 745 (7th Cir. 1994); *see also McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). If a plaintiff is able to make out a prima facie case, the burden of production then shifts to the employer to articulate a legitimate, nondiscriminatory reason for the challenged action. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). If the employer states such a reason, then the burden of production returns to the plaintiff to prove that the articulated reason is pretextual. *Id.* Even though the burden of production shifts under

this analysis, the burden of persuasion remains at all times with the plaintiff. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511 (1993).

"[A] plaintiff cannot defeat summary judgment simply by making out a prima facie case." *Lindahl v. Air France*, 930 F.2d 1434, 1437 (9th Cir. 1991). A plaintiff must produce "specific, substantial evidence of pretext" to escape summary judgment. *Steckl v. Motorola*, 703 F.2d 392, 393 (9th Cir. 1983). Ultimately, the evidence produced at trial must demonstrate, not only that the employer's articulated reason for the adverse action is false, but that discrimination was the real reason for the adverse action. *Hicks*, 509 U.S. at 511.

The District Court began its analysis by expressly assuming a prima facie case and granted summary judgment because, on the record before it, "plaintiff scarcely establishes a prima facie case and certainly does not provide specific, substantial evidence of pretext." Appendix to Petition at B-11. The record before the District Court demonstrated that Dela Rosa's difficulties with SMH began long before the negative performance evaluation he alleged as an "adverse action" taken because of his national origin and/or age.[7]

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[7] In an evaluation months before Dela Rosa transferred to the facility where all the unlawful conduct was alleged to have occurred, Dela Rosa's supervisor at that time rated him as not meeting job requirements in telephone techniques, oral/direct public contact, and effectiveness in explaining methods and procedures, and noted that he needed to improve his "communication skills." Dela Rosa's next evaluation, prepared in June 1992 by Dela Rosa's previous supervisor and Michael Johnston

For purposes of its analysis, the Ninth Circuit "assume[d], without deciding, that Dela Rosa has made out a prima facie case of disparate treatment," although it noted the weakness in even the prima facie case. Appendix to Petition at A-5 and n.3. Although Dela Rosa asserted that he need not "provide specific, substantial evidence of a pretext" in order to proceed to trial, the Ninth Circuit disagreed and ruled that Dela Rosa's rebuttal of SMH's legitimate nondiscriminatory reasons required a showing of "*specific, substantial evidence*" upon which a rational trier of fact could conclude that SMH's proffered reasons were pretextual. Appendix to Petition at A-7 (emphasis by the court). "Dela Rosa cannot merely rely on bare allegations of discrimination to survive summary judgment." Appendix to Petition at A-7. Ultimately, neither of the courts below could see any evidence upon which a rational jury could have found SMH's explanations pretextual, and the Ninth Circuit correctly affirmed the District Court's grant of summary judgment.

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together, noted that he needed "to work on improving relationships with others" and to "try to be more aware of co-workers needing your assistance . . . and less resistive toward providing it." Over the ensuing 26 months, Johnston received no fewer than *six* complaints from five different coworkers and *eleven complaints from seven different members of the nursing staffs and other "end users" of Dela Rosa's service*. Dela Rosa was counseled four times and given one written performance warning, but he never retreated from the attitude that none of those complaints suggested *he* might have a problem.

C. The Courts Below Correctly Found That The Evidence Could Not Support Petitioner's Claim of Unlawful Retaliation.

To establish a prima facie case of retaliation, Dela Rosa had to demonstrate that:

(1) he engaged in a protected activity,

(2) SMH thereafter subjected him to adverse employment action, and

(3) there was a causal link between the two events.

Jordan v. Clark, 847 F.2d 1368, 1376 (9th Cir. 1988), *cert. denied*, 488 U.S. 1006 (1989). If the plaintiff makes out a prima facie case, the burden of production shifts to the defendant to articulate some legitimate non-retaliatory reason for the adverse action. *Id.* The burden then shifts back to the plaintiff to show that the asserted reason is pretextual. *Id.*

Dela Rosa claimed he received a low performance evaluation from Johnston in retaliation for his having filed an EEOC charge alleging age and race discrimination on June 30, 1993.

The Ninth Circuit found that Johnston's evaluation of Dela Rosa's performance could not have been retaliatory because Johnston prepared Dela Rosa's evaluation weeks before Dela Rosa filed his EEOC charge. Appendix to Petition at A-10. The District Court observed also that Johnston actually gave Dela Rosa the evaluation before Johnston knew of the EEOC charge:

> [I]t is undisputed that Johnston prepared plaintiff's evaluation weeks before Johnston presented it to plaintiff on July 9, 1993, three days before Johnston knew that plaintiff filed the EEOC charge. Thus, there is no evidence of a causal link between plaintiff's protected activity and the event he alleges as an adverse action.

Appendix to Petition at B-12.

The Ninth Circuit declined to consider Dela Rosa's alternative argument that he could show the requisite causal linkage because Dela Rosa had filed an internal grievance in "opposition to discrimination" before the evaluation was prepared and presented. Dela Rosa argued that the EEOC charge and the July 1993 performance evaluation therefore were not "wholly unrelated" and could establish the requisite causal link. Essentially, Dela Rosa sought on appeal to amend his claim to be one based on Title VII's "opposition clause" as opposed to one based on the statute's "participation clause." *See* 1 B. Lindemann & P. Grossman, *Employment Discrimination Law* 649-57 (3d ed. 1996). The Ninth Circuit correctly recognized Dela Rosa's newly-minted argument as untimely and declined to consider it. Appendix to Petition at A-10 n.5.

The Ninth Circuit correctly affirmed summary judgment on Dela Rosa's retaliation claim because the timing of events demonstrated that the allegedly adverse evaluation could not have been motivated by an EEOC charge about which the evaluator had no knowledge.

D. Summary Judgment Was Correctly Granted On Petitioner's State Law Claims.

The Ninth Circuit found that "the district court properly concluded that none [of Dela Rosa's state law claims] survive summary judgment." Appendix to Petition at A-11. The District Court analyzed each of the state law claims in detail and, as to each, concluded that Dela Rosa had not met his burden of showing a genuine issue of material fact with respect to essential elements missing from his claims.

CONCLUSION

This Court should deny Dela Rosa's Petition for a Writ of Certiorari because this case presents no conflicts between the circuit courts or other important issues of law. The courts below plainly applied the appropriate legal standards and well-settled principles of law in their analysis of Dela Rosa's claims and concluded that the evidence before them raised no genuine issue of material fact for a jury to decide.

Respectfully submitted,

MARTHA E. GIBBS
Counsel of Record
JOSEPH E. LAMBERT
SNELL & WILMER L.L.P.
Attorneys for Respondents
One Arizona Center
Phoenix, Arizona 85004-0001
(602) 382-6233